

The Honorable Rosanna Malouf Peterson

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

NORMA MAXWELL,
P.
V.
VIRTUAL EDUCATION
SOFTWARE, INC., a Nevada
corporation.

No. CV-09-173-RMP

DEFENDANT'S REPLY
MEMORANDUM IN SUPPORT
OF MOTION TO EXCLUDE
PLAINTIFF'S EXPERT
WITNESS

Defendant.

Defendant Virtual Education Software, Inc. (“VESi”) hereby submits its reply memorandum in support of its Motion to Exclude Plaintiff’s Expert Witness. VESi respectfully requests that this Court grant its motion and exclude plaintiff Norma Maxwell’s (“Maxwell”) expert witness, Dr. Jane Halpert, at trial based on the fact that her testimony is not relevant or reliable.

This reply is supported by: (1) the pleadings and records in the Court's file; and (2) the Declaration of Sarah Turner in Support of Defendant's Reply Memorandum in Support of Motion to Exclude Plaintiff's Expert Witness, including the exhibits thereto, filed herein.

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II. LEGAL ARGUMENT

A. Dr. Halpert's Testimony is Not Reliable

Judges have broad discretion in determining the admissibility of expert witness testimony. See Henricksen v. ConocoPhillips Co., 605 F. Supp.2d 1142, 1153 (2009) (citing United States v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000)). In applying the Daubert standard, the expert testimony must be reliable and relevant. See Daubert v. Merrell Dow Pharmas., Inc., 509 U.S. 579, 589, 113 S.Ct. 2786 (1993). Here, Dr. Halpert's testimony is not reliable as evidenced by her report in which she opines as to the credibility of the allegations and gives her ultimate conclusion as to whether stereotyping occurred in this case.

12 Plaintiff relies on Tuli v. Brigham & Women's Hospital, Inc., 592 F.
13 Supp.2d 208 (2009), and Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct.
14 1775 (1989), to support the testimony of her expert witness. However, these
15 cases are distinguishable from the expert testimony offered by Dr. Halpert. In
16 Tuli, the Court allowed a social psychologist to testify about the operations of
17 stereotyping and discrimination based on empirical research. Id. at 215. The
18 Court made it clear that the testimony was admissible because the expert did not
19 opine as to the credibility of the allegations or give an ultimate conclusion. Id.
20 Similarly, in Price Waterhouse, the expert was allowed to testify as to patterns
21 of stereotyping without “indicating whether any particular comment was the
22 result of stereotyping.” Id. at 235-36. Contrary to the expert witnesses in Tuli
23 and Price Waterhouse, the expert’s testimony in Chadwick v. Wellpoint, Inc.,
24 550 F.Supp.2d 140 (D. Me. 2008) was excluded because the Court concluded
25 the testimony would not be helpful to the fact-finder. Id. at 143. In particular,
26 the expert’s testimony was excluded because the expert provided opinions

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1 about the specifics of the case and specifically opined about the meanings
 2 behind a supervisor's comments in an interview with the plaintiff. Id. at 147.

3 In this matter, Dr. Halpert's testimony is more reflective of the expert in
 4 Chadwick, than in Tuli or Price Waterhouse. In Dr. Halpert's report, she
 5 specifically applies the facts to this case and makes conclusions about
 6 stereotyping and discrimination in this matter. For example, Dr. Halpert
 7 provides a detailed opinion, citing to allegations in the case, where she forms
 8 her conclusions that the denial of Ms. Maxwell's schedule was based on a
 9 stereotype of working mothers, and that plaintiff being told she had a bad
 10 attitude was a stereotype that was consistent with pregnancy-related conditions
 11 and new mothers. See Declaration of Sarah N. Turner In Support of Reply
 12 Memorandum in Support of Motion to Exclude Plaintiff's Expert Witness
 13 ("Turner Decl."), Exhibit 1. Furthermore, Dr. Halpert cited to facts that were
 14 presented by plaintiff, but she ignored the facts related to VESi's position. The
 15 facts relied upon by Dr. Halpert are in obvious dispute, and Dr. Halpert is acting
 16 as an advocate for the plaintiff and making conclusions, which is the role of the
 17 fact-finder. Therefore, based on Dr. Halpert's conclusions, her testimony is not
 18 reliable, and she should be precluded from testifying.

19 **B. Dr. Halpert's Testimony is Not Relevant**

20 In its Motion to Exclude Plaintiff's Expert Witness, VESi cites to many
 21 cases where Courts have held that "it takes no special training to discern sex
 22 stereotyping." See Price Waterhouse, 490 U.S. at 256; Back v. Hastings on
Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2nd Cir. 2004); and
Chadwick v. Wellpoint Inc., 561 F.3d 38, 48 (1st Cir. 2009). Plaintiff asserts
 25 that social psychologists have been allowed to testify to gender stereotyping in
 26 the workplace. As stated above, some courts have allowed the expert testimony

1 when the expert does not provide an opinion or conclusion as to whether
 2 stereotyping occurred in the specific situation. On appeal, the appellate courts
 3 have concluded that "it takes no special training to discern sex stereotyping."
 4 See id. Here, Dr. Halpert will be applying the facts of the case to her research
 5 on stereotyping. Such testimony is not only biased and not helpful to the fact-
 6 finder, but it also does not require specialized expert knowledge. Accordingly,
 7 Dr. Halpert's testimony is not relevant and should be excluded.

8 **C. Dr. Halpert's Testimony Should Be Limited**

9 The Court should preclude Dr. Halpert from testifying because her
 10 testimony is not relevant or reliable. However, in the alternative, should the
 11 Court decide to allow Dr. Halpert to testify, her testimony should be solely
 12 limited to the explanation of stereotyping and how it operates. Dr. Halpert must
 13 be precluded from applying her empirical research to this case and offering her
 14 opinion or conclusions as to whether certain alleged comments made by VESi
 15 consisted of stereotyping.

16 **III. CONCLUSION**

17 For all of the reasons stated above, VESi respectfully requests that the
 18 Court grant defendant's motion to exclude plaintiff's expert witness Dr.
 19 Halpert.

20 Dated: July 14, 2010

21 GORDON & REES LLP

23 By: /s/ Sarah N. Turner

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 25 Sarah N. Turner, WSBA No. 37748
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CERTIFICATE OF SERVICE

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3 I hereby certify that on July 14, 2010, I electronically filed the
 4 foregoing with the Clerk of the Court using the CM/ECF system which will
 send notification of such filing to the following:

5 Kammi M. Smith
 6 Winston & Cashatt
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12 and I hereby certify that I have mailed by United States Postal Service the
 13 document to the following non CM/ECF participants:

14 N/A

15 DATED this 14th day of July, 2010.

16 By: /s/ Sarah N. Turner
 17 Sarah N. Turner
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